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## Judicial Review in Ontario – Recent Developments in the Remedies – Some Problems of Pouring Old Wine into New Bottles

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JUDICIAL REVIEW IN ONTARIO—RECENT DEVELOPMENTS IN THE REMEDIES—SOME PROBLEMS OF POURING OLD WINE INTO NEW BOTTLES.—The shortcomings of the remedies available at common law for securing the judicial review of administrative action have become wearisomely familiar.<sup>1</sup> Their satisfactory

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\* Daniel A. Lapres, Paris, France.

<sup>1</sup> The position was clearly put by the late Professor S. A. de Smith, when he said: "Until the Legislature intervenes, therefore, we shall continue to have two sets of remedies against the usurpation or abuse of power by administrative tribunals — remedies which overlap but do not coincide, which must be sought in wholly distinct forms of proceedings, which are overlaid with technicalities and fine distinctions, but which would con-

removal has been more troublesome than might have been anticipated. A preliminary choice is available to potential reformers. The prerogative orders can be abolished and replaced by a single statutory remedy of judicial review under which a specified range of relief is available upon grounds set out in the statute.<sup>2</sup> Alternatively, an attempt may be made simply to remove the obscure and unsatisfactory procedural and remedial snares and anomalies from the common law remedies, with or without some tinkering with the grounds of review associated with them, leaving enough of the common law intact so as to enable the development of the law of judicial review within its existing contours. The disadvantage of the first method is that the baby of a largely satisfactory and familiar substantive law of judicial review may be thrown out with the bath water of its disfiguring procedural and remedial technicalities and archaisms. The disadvantage of the second method is that reforming legislation may not succeed in totally eliminating the unfortunate distinctions inherent in the common law remedies and may create areas of uncertainty in the relationship between the new remedy and the old law.<sup>3</sup>

The Canadian attempts at reform to date have so far adopted variants of the less radical approach.<sup>4</sup> The purpose of this com-

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jointly cover a very substantial area of the existing field of judicial control. This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedevilled by the old forms of action." Report of the Committee on Administrative Tribunals and Enquiries (1957), Cmnd. 218, Minutes of Evidence, Appendix I, p. 10.

<sup>2</sup> This approach has been most notably urged by Professor K. C. Davis in the course of a comparison between the United States of America's Administrative Procedure Act and the common law remedies of judicial review; see in particular, Davis, *English Administrative Law — An American View*, [1962] P.L. 134.

<sup>3</sup> A reform inspired by Davis's approach also has to consider the implications for the unreformed law; thus, if *habeas corpus* were not included in the reform, would *certiorari* in aid survive? For the version of this problem that has arisen under the Federal Court Act, S.C., 1970-71-72, c. 1, see, for example, *Mitchell v. The Queen* (1976), 61 D.L.R. (3d) 77 (S.C.C.); *Pereira v. Minister of Manpower and Immigration* (1976) Ont. H.C., as yet unreported.

<sup>4</sup> For useful early commentaries on the legislation, see Mullan, *The Federal Court Act — a Misguided Attempt at Administrative Law Reform?* (1973), 23 U. of T.L.J. 14, and Mullan, *Reform of Judicial Review of Administrative Action — The Ontario Way* (1974), 12 O.H.L.J. 125. The Report on Remedies in Administrative Law, Cmnd. 6407, published in March 1976 by the English Law Commission (Law Com., No. 73) also attempts only a limited reform; but it is clear that this resulted not from the Commission's choice, but from the limited terms of reference imposed by the Lord Chancellor under the Law Commissions Act 1965, c. 22, s. 3(i)(e). See the Report, pp. 1-5.

ment is to examine some recent decisions that probe aspects of the relationship between the Judicial Review Procedure Act, 1971<sup>5</sup> and other remedies of judicial review of common law and statutory origin.

Despite the historical background of the 1971 legislative package in the *McRuer Report* and the reaction of critics who have argued that undue importance has been given to lawyers and the courts in the business of government,<sup>6</sup> the implication of some recent decisions is that the Judicial Review Procedure Act, 1971 has reduced the availability of judicial review. The intended impact of section 2(1) of the Act upon the former prerogative orders of mandamus, certiorari and prohibition would seem reasonably clear. For it provides in paragraph 1 that on an application by way of an originating notice the court may grant any relief that the applicant would be entitled to in proceedings for an order in the nature of certiorari, prohibition and mandamus. Thus, subject to any other relevant provisions in the Act,<sup>7</sup> the court may grant relief corresponding to that previously available under one of the prerogative orders, but the applicant may only obtain the relief for which he would have qualified under the relevant prerogative order.<sup>8</sup> This effects no significant change in the law. Section 2(1) paragraph 2, however, extends the benefits of summary procedure to the remedies of declaration and injunction, insofar as declar-

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<sup>5</sup> S.O., 1971, c. 48.

<sup>6</sup> See, for example, Willis, *The McRuer Report: Lawyers' Values and Civil Servants' Values* (1968), 18 U. of T.L.J. 351.

<sup>7</sup> S. 2(2) has reduced the importance of classifying a function as judicial, for it extends "to any decision made in the exercise of a statutory power of decision", the power of the court to quash for error of law on the face of the record. S. 2(4) is apparently intended to remove some untidiness from the old law by providing that the exercise of a statutory power of decision may be set aside when the applicant is entitled to a declaration. The term, "statutory power of decision", is defined in s. 1(f); the legislative aim here is to substitute a new concept to cover powers with a "judicial" flavour, whilst releasing the courts from the common law quagmire of classification. See, *Re Armstrong Investigators of Canada Ltd and Turner* (1976), 9 O.R. (2d) 284, at p. 288 (Div. Ct).

<sup>8</sup> See, Mullan, (1974), 12 O.H.L.J. 125, at pp. 145-148. This view is supported by Hughes J. in *Re Hershonan and City of Windsor* (1974), 1 O.R. (2d) 291, at p. 312: "Nor does the *Judicial Review Procedure Act, 1971* appear to simplify the problem of classification of the function performed by a tribunal, although it undoubtedly prunes away some of the procedural difficulties which formerly encumbered access to the Court. To paraphrase the well known words of F. W. Maitland, the prerogative writs and orders in lieu thereof we have buried, but they rule us from their graves." *Aff'd* (1974), 3 O.R. (2d) 423.

atory or injunctive relief is sought in relation to the exercise or failure to exercise a "statutory power".<sup>9</sup> Since the Act concerns remedies in the area of public law it was necessary to impose some such limitation upon remedies that are also widely used in private law, but unnecessary in relation to the prerogative orders which are, of course, only applicable to the discharge of public functions.

Thus, where the relief sought upon an application for judicial review is that the impugned decision be set aside, it should be sufficient for the applicant to show that he would be entitled to an order of certiorari. However, if the applicant cannot establish this, he may, nonetheless, be awarded this relief if he would be entitled a declaration in respect of a decision that was an exercise of a "statutory power of decision".

*Judicial Review Procedure Act, 1971  
and the Prerogative Orders*

The reasoning of some recent decisions of the Ontario courts is inconsistent with this analysis of the Act. In *Re Robertson and Niagara South Board of Education*,<sup>10</sup> an application for judicial review was made to the Divisional Court by parents of children attending a school that the respondents had resolved to close. The applicants sought to have the decision quashed on the ground that they had been denied a fair hearing before the resolution was passed. The application was refused. The majority judgment regarded the case as raising, "the question of whether the Divisional Court under the Judicial Review Procedure Act, 1971 has *jurisdiction* to give the orders asked for".<sup>11</sup> Giving further emphasis to the jurisdictional nature of the issue, Wright J. said:<sup>12</sup>

Our jurisdiction to deal positively with the issues thus raised depends upon the interpretation of the exercise of a statutory power of decision. . . . If the motion to close this school was the exercise of a statutory power of decision under these sections, the Divisional Court has jurisdiction to review the decision judicially.

It is submitted that the language of the Act does not support the conclusion that the Divisional Court may not set aside a

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<sup>9</sup> This term is defined by s. 1(g). It is now possible to request any combination of the forms of relief contained in s. 2.

<sup>10</sup> (1973), 41 D.L.R. (3d) 57 (Ont. Div. Ct); Mullan, (1974), 22 Chitty's L.J. 297.

<sup>11</sup> *Ibid.*, at p. 58, emphasis added.

<sup>12</sup> *Ibid.*, at p. 59.

decision that would be reviewable by certiorari, but which is not a "statutory power of decision". Since the applicants were attacking the legality of the decision for the failure by the Board to comply with the rules of natural justice, the court may have confused the question of its jurisdiction to entertain an application under the Judicial Review Procedure Act, 1971, for judicial review of the decision on *any* ground, with the separate question of whether the procedural code contained in the Statutory Powers Procedure Act, 1971,<sup>13</sup> was applicable, in this case, to the Board. For the existence of a statutory power of decision is a necessary, though not a sufficient, condition precedent to the applicability of the latter Act.<sup>14</sup> It is ironical that just as the availability of certiorari on any ground became indented with the applicability of the rules of natural justice, so the Divisional Court appears here to limit its power to set aside a decision of a public authority by reference to a statutory term, the functions of which are to trigger the application of the Statutory Powers Procedure Act, 1971, and to extend the range of decisions that the court may set aside.<sup>15</sup> In his dissenting judgment, Holland J. agreed that the respondents were not exercising a statutory power of decision, but he persuasively reasoned that this neither deprived the Divisional Court of jurisdiction to review, nor exhausted the respondents' duties of procedural fairness.<sup>16</sup>

Unfortunately, *Robertson* does not stand alone. Thompson J. appears to have fallen into the same error in *Re Maurice Rollins Construction Ltd and Township of South Fredericksburgh*.<sup>17</sup> The company made an application for judicial review to have a by-law passed by the respondent set aside on the grounds of bad faith and want of notice. His Lordship stated

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<sup>13</sup> S.O., 1971, c. 47.

<sup>14</sup> *Ibid.*, s. 3(1). Wright J. refers to the fact that the term, "statutory power of decision", is common to both Acts.

<sup>15</sup> See, Judicial Review Procedure Act, 1971, *supra*, footnote 5, s. 2(2), (4).

<sup>16</sup> *Supra*, footnote 10, at p. 63. Although the court, at p. 58, viewed the applicants' *locus standi* with some scepticism, this does not appear to be the basis upon which the court declined jurisdiction. Nor should the fact that the applicants also sought injunctive relief be of relevance, since the Judicial Review Procedure Act, 1971, s. 2(1) para. 2, limits the power to grant injunctive and declaratory relief by reference to the wider term, "statutory power", as defined by s. 1(g).

<sup>17</sup> (1976), 11 O.R. (2d) 418. Finding the matter to be urgent, Thompson J. exercised his discretion under s. 6(2) not to transfer it to the Divisional Court.

that he could not quash the by-law in these proceedings since it did not constitute the exercise of a statutory power of decision. No reference is made in the judgment to any earlier judicial pronouncement in point. Thompson J. stated, quite correctly, that the Act *extends* the court's power to review, by authorising it to set aside the exercise of a statutory power of decision for error of law on the face of the record. He added:<sup>18</sup>

If the decision is one made merely in the exercise of a statutory power (as defined), as distinguished from a statutory power of decision (as defined), then judicial review in the nature of *certiorari* is not indicated and the applicant is left to whatever form of relief he may otherwise have.

It is difficult to see the relationship between the former observation and the conclusion that the court may only quash an exercise of a statutory power of decision, especially since the applicant's grounds of attack would normally be regarded as going to the respondent's jurisdiction. Indeed, Thompson J. went on to uphold the applicant's procedural attack and to order that the by-law be declared invalid *and set aside*.<sup>19</sup>

A similarly narrow view of the jurisdiction conferred by the Judicial Review Procedure Act, 1971 is implicit in *Re Florence Nightingale Home and Scarborough Planning Board*,<sup>20</sup> in which the applicants sought, on an application for judicial review, to prohibit the Board from considering proposed amendments to an official plan and zoning by-laws. The applicants alleged that they had been denied an opportunity to be heard at the meeting of the Board at which it was decided that the Board should

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<sup>18</sup> *Ibid.*, at p. 422. In the next sentence he said that: "One must bear in mind that *certiorari* at common law was an attack upon jurisdiction." This is misleading: *R. v. Northumberland Compensation Appeal Tribunal ex parte Shaw*, [1952] 1 Q.B. 338. Indeed, the Judicial Review Procedure Act, 1971, s. 2(2), assumes the existence of this ground of review and extends it to bodies that may not have been characterized at common law as amenable to *certiorari* because of their non-judicial nature: *Re Becker Milk Co. Ltd and Director of Employment Standards of the Ontario Ministry of Labour* (1974), 1 O.R. (2d) 739 (Div. Ct.).

<sup>19</sup> *Ibid.*, at p. 431. Unlike the majority in *Robertson*, Thompson J. imposed upon the municipality a common law duty to give notice to the applicant and an opportunity to be heard prior to the enactment of the by-law, although he doubted whether the by-law was made in the exercise of a statutory power of decision.

<sup>20</sup> [1973] 1 O.R. 615 (Div. Ct.). Again, the court is primarily concerned with the existence of a statutory power of decision for the purpose of determining the applicability of the Statutory Powers Procedure Act, *supra*, footnote 13. See in contrast *Chadwill Coal Co. Ltd v. Treasurer etc. for Province of Ontario* (1976), 1 M. P. L. R. 25 (Div. Ct.).

meet again to recommend a change to the official plan which might, if adopted, further limit the use to which the applicants could put their land. The Divisional Court appears to have considered only whether the Board had thus exercised a statutory power of decision. The court held that it had no power to prohibit the Board from proceeding to the next stage of the decision-making process because nothing had so far been decided which had a sufficient finality upon the rights of the applicants to amount to a "deciding or prescribing" of rights so as to amount to the exercise of a statutory power of decision. The court addressed itself primarily to the applicability of the Statutory Powers Procedure Act, 1971.<sup>21</sup> As in *Robertson*, however, it is implicit in the judgments that, absent a statutory power of decision, the court has no jurisdiction under the Judicial Review Procedure Act, 1971 to grant the relief available in certiorari proceedings and that there is no room for the imposition of procedural duties to be derived from any more pervasive notion of a duty to act fairly.

The jurisdictional issue would not be of such importance if it were clear that statutory powers of decision encompassed all those decisions reviewable by certiorari at common law. Indeed, the definition itself would appear to be framed in such a way as to avoid some of the more notorious limitations upon the scope of certiorari that had developed from the courts' insistence that the decision under attack be required to be made upon a judicial or quasi-judicial basis. The provisions of subsections (2), (3), (4) of section 2 only make sense if, in some respects at least, the term, "statutory power of decision", includes situations that were excluded, or probably excluded, from the scope of certiorari.<sup>22</sup> However, the combined effect of recent English cases on the availability of certiorari and some Ontario

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<sup>21</sup> However, Parker J. stated, at p. 618, that: "I think in this case we are governed by the interpretation section of the Judicial Review Procedure Act, 1971 ... section 1(f)."

<sup>22</sup> For example, the inclusion of decisions in the definitional s. 1(f)(ii), "deciding ... the eligibility of any person or party to receive or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not", would appear to have been designed to avoid the distinction drawn in some licensing decision between "rights" and "privileges"; see, for example, *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66, a decision now revived, to an uncertain extent, by the Supreme Court of Canada in *Howarth v. National Parole Board* (1974), 50 D.L.R. (3d) 349. Similarly, the reference to decisions "prescribing" legal rights or eligibility for benefits may well refer to decisions that have a *lis inter partes* flavour, but which are contained in legislative form; see, for example, *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512.



decisions interpreting the term "statutory power of decision", suggests that if the view of jurisdiction under the Judicial Review Procedure Act, 1971, adopted in *Robertson and Maurice Rollins Construction* prevails, then some serious *lacunae* in the legislative scheme will appear.<sup>23</sup>

For example, the English Divisional Court has held decisions, made by a Board established under the prerogative powers of the Crown, reviewable by certiorari.<sup>24</sup> The same view has been taken of disciplinary proceedings of a university incorporated by charter.<sup>25</sup> In *Re Godden*,<sup>26</sup> the Court of Appeal granted an order of prohibition on the ground of bias to prevent the making of a recommendation that would, although not binding, have a powerful impact upon the final decision-maker. In *R. v. Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association*,<sup>27</sup> the English Court of Appeal issued an order of prohibition to prevent the corporation from implementing a resolution to increase the number of licences that it would grant, without first honouring an undertaking to afford to existing licensees an opportunity to be heard. Lord Denning M.R. thought that the corporation would have been under a duty to hear even

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<sup>23</sup> The English Law Commission, *op. cit.*, footnote 4, has recommended, at p. 20, that the availability of declarations and injunctions in the public law field should not be limited to the exercise or failure to exercise a statutory power, since "it is clear that judicial review is not limited to statutory powers". Instead, the Commission has proposed, at p. 21, that: "The Court should be directed to have regard to the nature of the matters in respect of which, and the nature of the persons or bodies against whom, relief may be granted by way of the prerogative orders and (in view of the special case of the declaration as to subordinate legislation and the developing scope of the prerogative orders themselves) to the justice and convenience of the case in the light of all its circumstances."

<sup>24</sup> *R. v. Criminal Injuries Compensation Board ex parte Lain*, [1967] 2 Q.B. 864.

<sup>25</sup> *R. v. Aston University ex parte Roffey*, [1969] 2 Q.B. 538, a decision, however, which must be regarded as seriously weakened by the judgment of the Court of Appeal in *Herring v. Templeman*, [1973] 3 All E.R. 569. See also *Re Vanek and Governors of The University of Alberta* (1976), 57 D.L.R. (3d) 595 (Alta S.C. App. Div.). In *Re Thomas and Committee of College Presidents* (1973), 37 D.L.R. (3d) 69 (Ont.), the Divisional Court refused relief in the nature of certiorari, holding that the respondents were too far removed from any grant of power under the University of Guelph Act, S.O., 1964, c. 120 and that letters patent had conferred no adjudicative duty. Contrast, *Re Polten and Governing Council of University of Toronto* (1976), 8 O.R. (2d) 749 (Div. Ct.).

<sup>26</sup> [1971] 3 All E.R. 482.

<sup>27</sup> [1972] 2 Q.B. 299. In *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), Ont. C.A., as yet unreported, the reasoning in *Liverpool Taxi* was adopted.

if it had not given the assurance.<sup>28</sup> Finally, in *R. v. London Borough of Hillingdon ex parte Royco Homes Ltd.*,<sup>29</sup> Lord Widgery C.J. appears to have severed any lingering connection between the prerogative order of certiorari and the existence of a duty upon the body whose decision is under attack to act judicially.

If *Robertson* is correct, then it is doubtful whether the Judicial Review Procedure Act, 1971, provides a remedy on the facts of any of these cases.<sup>30</sup> For example, in *Re Raney*<sup>31</sup> the applicants sought to have set aside a recommendation to the Minister by a non-statutory body within the Ministry of Transportation and Communications that the value of the contracts for which the applicants should be in future allowed to tender be reduced. The Ontario Court of Appeal held that since the committee derived no power from statute its recommendations did not constitute the exercise of a statutory power of decision. The court also added, in response to the alternative argument that certiorari lay, that the recommendation of the committee could not be quashed because its function was not judicial. *Florence Nightingale*<sup>32</sup> appears analogous to *Godden*,

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<sup>28</sup> *Ibid.*, at p. 307.

<sup>29</sup> [1974] 2 All E.R. 643. It should be noted that the basis of the attack in *Royco* was substantive, not procedural, *ultra vires*. It would be premature to conclude from the availability of certiorari to quash that a judicial-type hearing is a condition precedent to a valid decision. The Supreme Court of Canada, on the other hand, appears to have linked inextricably the jurisdiction of the Federal Court of Appeal under the Federal Court Act, *supra*, footnote 3, s. 28, with the availability of certiorari and the rules of natural justice: *Howarth v. National Parole Board*, *supra*, footnote 22. See also, *Martineau and Butters v. Matsqui Institution*, [1976] 2 F.C. 198 (Fed. Ct App.).

The primary significance of *Royco* in English administrative law is that by allowing a decision to be challenged by means of the motion procedure of certiorari, without requiring that the right of appeal to the Minister first be exhausted, expeditious access to the courts is provided for those dissatisfied with planning decisions. It also opens the possibility of conferring upon neighbours *locus standi* to challenge planning decisions. Standing had previously been denied under both the statutory remedy to quash (*Buxton v. Minister of Housing and Local Government*, [1961] 1 Q.B. 278), and an action for a declaration (*Gregory v. London Borough of Camden*, [1966] 2 All E.R. 196). Contrast, *Lord Nelson Hotel Ltd v. City of Halifax* (1973), 33 D.L.R. (3d) 98 (N.S. Sup. Ct App. Div.).

<sup>30</sup> Legal proceedings would thus have to be brought by way of an action for a declaration or an injunction unless the relief was in respect of the exercise of a "statutory power".

<sup>31</sup> (1975), 4 O.R. (2d) 249 (C.A.).

<sup>32</sup> *Supra*, footnote 20. Compare, *Bell v. Ontario Human Rights Commission* (1971), 18 D.L.R. (3d) 1 (S.C.C.); *Saulnier v. Québec Police Commission et. al.* (1976), 57 D.L.R. (3d) 545 (S.C.C.).

although in the former case the court resorted to the statutory definition and thus avoided the substantive difficulties of determining the procedure that the court should appropriately impose upon the agency before the final stage of the administrative process. However, it should also be pointed out that in subsequent decisions some non-final decisions have been encompassed within the court's jurisdiction.<sup>33</sup> Lastly, in *Robertson* itself, the Divisional Court unanimously adopted an approach to the definition of "statutory power of decision" that was remarkably similar to the dichotomy made in some cases at common law between judicial and administrative decisions.<sup>34</sup>

No reference was made to *Robertson* or *Florence Nightingale* in *Chadwill Coal Co. Ltd v. Treasurer etc. for Province of*

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<sup>33</sup> See, for example, *Zadrevce v. Town of Brampton* (1972), 28 D.L.R. (3d) 641 (Ont. Div. Ct.), rev'd on other grounds, [1973] 3 O.R. 498 (C.A.); *Re Hershoran and City of Windsor* (1974), 1 O.R. (2d) 291 (Div. Ct.), aff'd. (1974), 45 D.L.R. (3d) 533 (Ont. C.A.); *Re Orangeville Highlands Ltd and A.G. of Ontario* (1975), 8 O.R. (2d) 97 (Div. Ct.). In *Re London Gardens Ltd and Township of Westminster* (1976), 9 O.R. (2d) 175, the Divisional Court held that a preliminary ruling by an Assessment Review Court that the taxpayer had the onus of proof, was the exercise of a statutory power of decision, but in its discretion refused relief. Compare the view adopted by the Federal Court of Appeal of its jurisdiction under the Federal Court Act, 1970, *supra*, footnote 3, s. 28 to set aside "a decision or order...made by or in the course of proceedings before a federal board, commission or other tribunal..." (emphasis added). Thus in *A.G. Can. v. Cylien*, [1973] F.C. 1166, Jaccett C.J. held that review under s. 28 extended only to the exercise or purported exercise of "the specific jurisdiction or powers conferred by the statute" (at p. 1175), and not to the "myriad of decisions or orders that the tribunal must make in the course of the decision-making process" (at p. 1173).

<sup>34</sup> The court held that the respondents were not "deciding or prescribing the legal rights, privileges..." of the applicants because, "the right or privilege of the applicants to have their children attend a particular school is not a legal right or privilege and is not subject to judicial review under the Ontario statutes as they stand. The decision to close the school was an administrative decision..." (at p. 60). The court stated that the adjective "legal" in s. 1(f)(i) qualified all the succeeding nouns, and not simply "rights". Moreover, the applicants' contention that the Board's decision fell under s. 1(f)(ii) on the ground that it decided or prescribed "the eligibility of any person...to the continuation of a benefit or licence, whether he is legally entitled thereto or not...", failed, since "the respondent Board were deciding as a matter of policy and prudent administration, whether or not the school ought to be closed to all students, not whether one or a group should be eligible or ineligible to attend it" (at p. 61). In the *Liverpool Taxi* case, *supra*, footnote 27, the corporation's decision to increase the number of licences available was as clearly one of "policy and prudent administration", rather than one of deciding the legal rights or privileges or the eligibility of existing licensees, as was that of the Board in *Robertson*, *supra*, footnote 10.

*Ontario*<sup>35</sup> when the court was prepared to review a ruling by hearing officers, appointed to inquire and report to the Minister, either as an exercise of a statutory power of decision or as a matter reviewable at common law by prohibition. In *Re Hershoran and City of Windsor*<sup>36</sup> an application was made to the Divisional Court to declare invalid a by-law made by the city and approved by the Minister of Municipal Affairs, expropriating the applicants' land, upon which tax arrears had accrued. The ground of attack was that the applicants had not received adequate notice before the by-law was passed. In holding for the applicants, Hughes J. stated that the provisions of the Judicial Review Procedure Act, 1971, "do not, in my view, deprive this court of any of its inherent powers and in particular of those powers of supervision which it derived from the Court of Queen's Bench".<sup>37</sup>

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<sup>35</sup> *Supra*, footnote 20. See, also, *Re Thomas and Committee of College Presidents*, *supra*, footnote 25; *Re Raney*, *supra*, footnote 31.

<sup>36</sup> *Supra*, footnote 33.

<sup>37</sup> *Ibid.*, at p. 312. The judgment, in other respects, presents difficulties. For the court appears to hold that the municipality was bound by the Statutory Powers Procedure Act, 1971, *supra*, footnote 13, despite s. 3(2)(h) which excludes from the ambit of the Act, "proceedings of a tribunal empowered to make... by-laws insofar as its power to make by-laws is concerned". The court treated this as a privative clause which would not protect a municipality which had exceeded its jurisdiction by failing to discharge its quasi-judicial duty to hold a hearing, in accordance with *Wiswell*, *supra*, footnote 23, before a by-law was passed. However, the courts have never adopted the same attitude to partial exclusion clauses as they have to those purporting totally to exclude judicial review: *Smith v. East Elloe R.D.C.*, [1956] A.C. 736, *Pringle v. Fraser* [1972] S.C.R. 821. Moreover, the Supreme Court of Canada in *Law Society of Upper Canada v. French* (1974), 49 D.L.R. (3d) 1, was prepared to find, at p. 15, on less substantial grounds than are to be found in the express words of s. 3(2)(h), that the Law Society Act, R.S.O., 1970, c. 238, had by implication excluded one limb of the rules of natural justice.

The Divisional Court's interpretation deprives s. 3(2)(h) of any legal effect, in that it is, in any event, only capable of applying to those aspects of by-law making that at common law are required to be performed in a quasi-judicial manner. The reasoning was recently adopted in *Atkinson v. Municipality of Metro Toronto* (1976), 12 O.R. (2d) 401, at p. 414 (C.A.). The section is now explicable only on the basis of *inclusio ex abundanti cautela*. Of course, the Statutory Powers Procedure Act, 1971, *ibid.*, should not be regarded as an exhaustive code of administrative procedure: see Mullan, *Fairness: The New Natural Justice* (1975), 25 U.T.L.J. 281. Insofar as the court, at p. 315, appears to require a hearing to be held both by the municipality and by the Minister before he decides whether to approve the by-laws, the reasoning of the Divisional Court is difficult to reconcile with that of the Court of Appeal in *Zadrevce v. Town of Brampton*, *supra*, footnote 33.

In addition, in *Re Canada Metal Co. Ltd and MacFarlane*,<sup>38</sup> Keith J. entertained an application for judicial review under the Judicial Review Procedure Act, section 6(2), in which the applicants sought to have set aside a stop order issued under the Environmental Protection Act.<sup>39</sup> The learned judge proceeded on the basis that the availability of the relief sought depended upon whether the decision of the official was reviewable by certiorari. He found that it was, and set the stop order aside on the ground that there was insufficient admissible evidence to satisfy the conditions upon which the power was exercisable.<sup>40</sup> The judgment makes no reference to whether the official was exercising a statutory power of decision. Similarly, in *Re Dabor Motors Ltd and MacCormac*,<sup>41</sup> the Divisional Court dealt with an application to set aside, for lack of an opportunity to be heard, a proposal made by the registrar under the Motor Vehicle Dealers Act<sup>42</sup> to suspend the applicant's registration, by considering whether there was a decision that was reviewable by certiorari. The court held that since the registrar had no power to make a final decision, and a full *de novo* hearing was available before the Commercial Registration Appeal Tribunal, "this application is premature, it being our finding that no decision has yet been made".<sup>43</sup> Whilst in this case the court reached the same result as it would have reached had it considered that its jurisdiction depended upon finding a statutory power of decision exercisable by the registrar, its resort to the more flexible rules of common law facilitated consideration of the statutory scheme as a whole,<sup>44</sup> and the impact upon the individual of the registrar's proposal.

*Judicial Review Procedure Act, 1971  
and the Common Law Motion to Quash*

The converse of the jurisdictional issue raised by *Robertson* is the extent to which the Judicial Review Procedure Act, 1971, displaces or provides alternative remedies of judicial review, other

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<sup>38</sup> (1974), 41 D.L.R. (3d) 161 (Ont. H.C.).

<sup>39</sup> S.O., 1971, c. 86, s. 75.

<sup>40</sup> Under s. 7, the Director must have "reasonable and probable grounds" to believe that the discharge of the pollutant constitutes "an immediate danger to human life, the health of any person, or to property".

<sup>41</sup> (1975), 5 O.R. (2d) 473.

<sup>42</sup> S.O., 1971, c. 21, ss 6(2), 7.

<sup>43</sup> *Supra*, footnote 41, at p. 477.

<sup>44</sup> Similarly, in *Zadrévec*, *supra*, footnote 33, neither the Divisional Court nor the Court of Appeal rendered decision upon the basis of whether the municipality was exercising a statutory power of decision.

than the prerogative orders contained in section 2(1). The Act does not abolish any of the common law remedies, but provides that proceedings commenced for such a remedy shall be treated as an application for judicial review.<sup>45</sup>

Prior to the enactment of the Judicial Review Procedure Act, 1971, it was settled law in Ontario that the decision of a consensual arbitrator was reviewable upon a summary motion to quash. The remedy was procedurally similar to certiorari in respect of decisions made by statutory bodies, although the proper scope of review has been controversial.<sup>46</sup> In *Port Arthur Shipbuilding Company Ltd v. Arthurs*,<sup>47</sup> Judson J., in the course of considering the appellant company's remedy if the arbitrator whose decision was under attack were characterized as non-statutory, stated:<sup>48</sup>

The notice of motion in these proceedings makes it clear that the relief asked for is an order quashing the award. It does not seem to me to be of any consequence that the motion contains a reference to certiorari. The procedure is the same and in my opinion the notice of motion is sufficient to justify an order quashing the award.

The Judicial Review Procedure Act, 1971, however, does make it important to determine the appropriate remedy. For if the ordinary motion to quash an arbitrator's decision is a proceeding by way of application in the nature of certiorari within section 2(1), review must normally be sought before the Divisional Court; if it is not, then the matter will be heard by a single judge of the High Court. The issue is whether the language of section 2(1) includes remedies analogous to certiorari. A number of reasons may be advanced for adopting a wide construction of the Act. First, the words, "in the nature of", rather than, "in lieu of", evince a legislative intent to include remedies procedurally

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<sup>45</sup> S. 7. S. 8 confers a discretion upon a judge before whom is brought an action for a declaration or an injunction in relation to the exercise of a statutory power, to treat it as an application for judicial review.

<sup>46</sup> Since *Government of Kelantan v. Duff Development Co. Ltd*, [1923] A.C. 395, the Supreme Court has allowed review for error of law on the face of a consensual arbitration award, except in respect of the precise point of law referred by the parties to the arbitrator. The scope of review in this latter situation and the flexibility that courts should adopt in drawing the distinction have been controverted: see, especially, *Bell Canada v. Office and Professional Employees Union*, [1974] S.C.R. 335; *Metropolitan Toronto Police Association v. Metropolitan Toronto Board of Commissioners of Police*, [1975] 1 S.C.R. 630.

<sup>47</sup> (1968), 70 D.L.R. (2d) 693 (S.C.C.).

<sup>48</sup> *Ibid.*, at p. 702.

and substantively similar to the order that replaced the writ of certiorari.<sup>49</sup> Secondly, since there may be substantial similarity in the issues raised in reviewing arbitrations, the Act should be construed to vest jurisdiction in the Divisional Court, which the 1971 legislation intended to develop an expertise in administrative law, whether, before the Act, review would have been sought through the ordinary motion to quash, certiorari or the Arbitrations Act.<sup>50</sup> Thirdly, it would be inconsistent with an important aim of the 1971 Act, namely, simplification of the procedures and remedies of judicial review, to subject litigants to the hazards of delay and expense involved in selecting the wrong forum or remedy. For example, in *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association*,<sup>51</sup> Arnup J.A., disagreeing with the court below<sup>52</sup> held that an arbitrator appointed under the terms of a collective agreement, which was not statutorily required to contain an arbitration clause, was consensual under the *Port Arthur* test.<sup>53</sup> Since proceedings in this case were instituted before the Judicial Review Procedure Act, 1971, came into force the court did not have to decide the jurisdictional problem discussed above.

However, in *Re Ontario Provincial Police Association Inc. and the Queen*,<sup>54</sup> the Divisional Court held that it had jurisdiction to review consensual arbitrations. Keith J. rested his judgment upon the legislative choice of the words, "in the nature of", rather than, "in lieu of" the prerogative orders specified in paragraph 1 of section 2(1). If this decision is correct, then the Divisional Court, subject to the exercise of discretion by a single judge of the High Court under section 6(2), has exclusive jurisdiction to review both statutory and consensual arbitrations.

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<sup>49</sup> Supreme Court of Ontario Rules of Practice, R.R.O., 1970, Reg. 545, rs 629, 630, repealed by O. Reg. 115/72, s. 18.

<sup>50</sup> R.S.O., 1970, c. 25, s. 12.

<sup>51</sup> [1972] 2 O.R. 793, at p. 799.

<sup>52</sup> [1972] 1 O.R. 409. The case was ultimately argued and decided on the basis that the arbitration was consensual: *supra*, footnote 46, at pp. 632, 653.

<sup>53</sup> *Supra*, footnote 51, Arnup J.A., at p. 799, left open the question of whether an arbitrator appointed under the statutory procedure would have been a statutory arbitrator. For the position after the Police Amendment Act, S.O., 1972, c. 103, s. 2, see, *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1975), 5 O.R. (2d) 285.

<sup>54</sup> (1974), 3 O.R. (2d) 698.

*Judicial Review Procedure Act, 1971  
and Other Statutory Remedies*

What, however, if the applicant seeks a statutory remedy of judicial review, such as, for example is contained in the Arbitrations Act, section 12? The problem was considered in *Re Brown and the Queen*,<sup>55</sup> where it was argued that an application made under the Judicature Act<sup>56</sup> for a motion to quash a conviction must, by virtue of the Judicial Review Procedure Act, 1971, section 7, now be treated as an application for judicial review, and unless the case was urgent must be heard by the Divisional Court. Morden J. stated that the 1971 Act was intended to deal with the difficulties inherent in the dual system of common law remedies; no such problems had existed with statutory motions to quash. He held that the reference in the 1971 Act to an "application for an order *in the nature of* . . . certiorari" should be construed only to take account of the substitution of the writ of certiorari by an application on an originating notice for an order.

It is generally agreed that the procedural reforms contained in the Judicature Act and their analogue in civil procedure — first introduced in Ontario in 1888<sup>57</sup> — did not extend the availability or the scope of the remedy formerly obtained by writ.<sup>58</sup> However, it is submitted that no firm conclusion should be drawn merely from the use of the words, "in the nature of", in the 1971 Act. For whilst it is true that the procedural reforms in Ontario did not generally use this formula and that the orders were commonly referred to as orders "in lieu of certiorari", the words, "in the nature of", have often been employed to denote no more than a procedural reform. For example, the proceeding instituted by notice of motion in cases "that were formerly instituted or taken by a writ of quo war-

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<sup>55</sup> (1976), 11 O.R. (2d) 7.

<sup>56</sup> R.S.O., 1970, c. 228, s. 69(1).

<sup>57</sup> Rules of Practice of the Supreme Court of Ontario, 1888, r. 1140, which provided that the writ should not issue, but that an order should be substituted "*which shall have the same effect as a writ formerly had*". Emphasis is added. The rule took its modern form in 1913, when the italicized words were replaced by, "but all necessary provisions shall be made in the judgment or order".

<sup>58</sup> In *R. v. Cook* (1909), 10 O.L.R. 415, Anglin J. held that the Judicature Amendment Act, S.O., 1908, c. 34, s. 1 which first provided for proceedings by notice of motion to quash a conviction, "instead of by certiorari", did not effect any substantive change in the law, but merely telescoped the two stages of the writ procedure.



ranto, or by information in the nature of quo warranto",<sup>59</sup> has been described as "in the nature of quo warranto", even though the substance of the remedy is identical with that of the old remedy.<sup>60</sup> Moreover, it has not been suggested in other jurisdictions where the writ procedure has been superseded by a notice of motion for an order *in the nature of* the prerogative orders,<sup>61</sup> that this formula has extended the scope of the remedies.<sup>62</sup>

Having decided that the Judicial Review Procedure Act, 1971 did not confer exclusive jurisdiction upon the Divisional Court, Morden J. in *Brown* left open the question of whether that Act provided an alternative remedy to the statutory motion to quash contained in the Judicature Act, section 69(1). The Divisional Court has held in *Serre v. Town of Rayside-Balfour*<sup>63</sup> that an application can be made to it under the Act to declare a by-law invalid. The court reasoned that the statutory motion to quash by-laws provided in the Municipal Act,<sup>64</sup> section 283 is not exhaustive<sup>65</sup> and that the effect of the 1971 Act, section 2(1), paragraph 2, is to enable declaratory relief in respect of the exercise of a statutory power to be sought in a summary procedure for an application for judicial review. The court was not required to decide the issue raised in *Brown*, namely, whether the statutory motion to quash was "in the nature of certiorari", and thereby subsumed under section 7. However, if a litigant were to commence proceedings by way of an action for a declaration that a by-law was invalid, the trial judge would, by virtue of section 8, have a discretion to treat the action as an application for judicial review and to transfer the matter to the Divisional Court.

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<sup>59</sup> Judicature Act, *supra*, footnote 56, s. 147(1).

<sup>60</sup> See *R. ex rel. Haines v. Hanniwell*, [1948] O.R. 46; Holmstead and Gale, Ontario Judicature Act and Rules of Practice, Vol. I (1958), pp. 461-464. Although the Judicial Review Procedure Act, 1971, *supra*, footnote 5, does not encompass quo warranto proceedings, the words, "in the nature of", may have been derived from this source and hence, should be given a narrow construction.

<sup>61</sup> See, for example, the Alberta Rules of Court, Alta Reg. 390/68, rs 826, 830; N.S. Civil Procedure Rules, 1971, r. 56.02; Federal Court Act, *supra*, footnote 3, s. 18(b).

<sup>62</sup> *Re Vanek and Governors of the University of Alberta*, *supra*, footnote 25.

<sup>63</sup> (1976), 11 O.R. (2d) 779 (Div. Ct.).

<sup>64</sup> R.S.O., 1970, c. 284.

<sup>65</sup> The court relied upon *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, *supra*, footnote 22, where the Supreme Court allowed an action for a declaration to be brought outside the limitation period for the statutory summary remedy.

The task of determining the impact made by the Judicial Review Procedure Act, 1971, upon the statutory remedy is complicated by the twelve months limitation period imposed upon the summary motion to quash by section 286 of the Municipal Act. The problem arose in *Re Dorfman and Town of Fort Erie*.<sup>66</sup> The applicants instituted proceedings under the 1971 Act for declaratory relief and for an order setting aside for invalidity a by-law and resolution<sup>67</sup> passed more than twelve months previously by the respondent. They argued that since they had had no prior opportunity to be heard, the respondent had no legal justification for having demolished their house. Without deciding the merits of the case, the Divisional Court, in its discretion declined to grant declaratory relief, on the ground that an award of damages was the appropriate remedy.<sup>68</sup> The Divisional Court, of course, has no jurisdiction over claims for damages, which must still be pursued by way of action. Houlden J. stated:<sup>69</sup>

In my opinion, an adequate alternative remedy by way of damages, in which incidentally the validity of the by-law and resolutions of the respondent municipality can be questioned, is available to the applicants and, therefore, judicial review should be refused.

The italicised portion of this statement, however, appears to overlook the Municipal Act, section 344, which provides that a claim for damages for anything done under the authority of a by-law or resolution may not be pursued within one month of the quashing or repeal of the by-law or resolution.<sup>70</sup>

Indeed, Houlden J. subsequently acknowledged this point, when rejecting the applicants' argument that the by-law and resolution be set aside.<sup>71</sup> He relied upon *Re Clements and Toronto*<sup>72</sup> for the proposition that after the expiry of the limitation period contained in section 286, by-laws may be attacked only by way of action. It is curious that the court did not also use this argument in respect of the claim for declaratory relief, for if the purpose of section 286 is to protect municipalities from being subjected to

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<sup>66</sup> (1975), 54 D.L.R. (3d) 186.

<sup>67</sup> The provisions of, *inter alia*, ss 283 and 286, apply, by virtue of s. 282, to by-laws, orders and resolutions.

<sup>68</sup> S. 2(5) preserves the judicial discretion associated with the remedies listed in s. 2(1).

<sup>69</sup> *Supra*, footnote 66, at p. 189 (emphasis added).

<sup>70</sup> In *Gray v. City of Oshawa*, [1971] 3 O.R. 112, Houlden J. refused, on this ground, to entertain a claim for damages made in a proceeding by way of an action for a declaration.

<sup>71</sup> *Ibid.*

<sup>72</sup> (1960), 20 D.L.R. (2d) 497, [1960] O.R. 18 (C.A.).

challenge by summary procedure for longer than a year, it is difficult to appreciate why the argument in *Clements* should not be as applicable to any relief that may be sought in a single summary proceeding under the 1971 Act. The problem is caused by a failure to provide in the Act for the effect upon other statutes of extending summary procedure to declarations in respect of the exercise of a statutory power. Although the reasoning in *Serre*<sup>73</sup> may suggest that the effect of section 286 can be avoided by seeking declaratory relief under the Judicial Review Procedure Act, 1971, it is submitted that since the by-law impugned in that case was passed within twelve months of the institution of proceedings, it is, at best, equivocal on the point.

After being sent empty-handed from the Divisional Court, what remedy is available to the hapless applicants in *Dorfman*? Presumably, they must bring an action before a single judge of the High Court for a declaration of invalidity.<sup>74</sup> May they then request the judge to exercise his discretion under the Judicial Review Procedure Act, 1971, section 8, to,

... direct that the action be treated and disposed of summarily, insofar as it relates to the exercise... or purported exercise of [a statutory] power, as if it were an application for judicial review and may order that the hearing on such issue be transferred to the Divisional Court...?

The Act does not indicate the factors that judges should take into account in deciding how to exercise their discretion under this section, although the need for further development of the facts,<sup>75</sup> or the simplicity of the questions of law in issue should militate against a transfer to the Divisional Court. The question

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<sup>73</sup> *Supra*, footnote 63. Neither *Dorfman* nor *Clements* was cited in the short reasons given orally by Galligan J.

<sup>74</sup> In *Re Clements and Toronto*, *supra*, footnote 72, at p. 504, the Court of Appeal also stated that the clear intent of s. 286 prevailed over r. 611, under which an application may be made by originating notice for a declaratory judgment: "When the right of a person depends upon the construction of a deed, will or other instrument." See, also, *Sun Oil Co. v. City of Hamilton*, [1961] O.R. 209 (C.A.).

The circumstances in which the validity of a by-law can be raised collaterally in proceedings instituted summarily are unclear: see, for example, *Re Sekretov and City of Toronto*, [1973] 2 O.R. 161 (C.A.) (the court took jurisdiction on an originating notice under r. 610); *Re Sibley and Township of Fenelon* (1972), 26 D.L.R. (3d) 541 (Ont. H.C.), (Keith J. denied jurisdiction in mandamus proceedings brought to require the issue of a building permit that had been withheld under the impugned by-law). Compare, *Children's Aid Society of Metropolitan Toronto v. Lytle*, [1973] S.C.R. 568.

<sup>75</sup> See, *Campbell Soup Co. Ltd v. Farm Products Marketing Board* (1976), 10 O.R. (2d) 405, at p. 441 (H.C.).

here, however, is whether the lapse of the limitation period imposed upon the summary statutory remedy under the Municipal Act should conclusively weigh against the positive exercise of discretion under section 8. The argument for holding a transfer inappropriate here is that the summary remedy, of general application, created by the 1971 Act should not be regarded as having, by a side wind, been intended to defeat the clear and specific legislative intent embodied in section 286 of the Municipal Act, to which the courts have consistently given effect.

If this argument does not prevail, and the judge finds no other reason for refusing to transfer the matter, what should be the applicants' position before the Divisional Court? The court might, of course, return the matter to the trial judge on the ground that he exercised his discretion on a wrong legal principle. Alternatively, it might hold that its earlier decision made the matter *res judicata*, even though the reasoning upon which, in its discretion, it had refused to grant declaratory relief contained a significant error and the applicants were now before the court after having instituted proceedings by way of an action.

If, however, the court does not dismiss the application on either of these grounds, it will then be necessary to decide whether effect should be given to the time limitation of section 286. First, it may be argued that section 12(1) of the Judicial Review Procedure Act, 1971 applies the Municipal Act limitation period to an application for judicial review, irrespective of the relief sought. For this argument to succeed, however, the statutory motion to quash would have to be held to be a proceeding in the nature of certiorari. Secondly, even if, in the face of the reasoning in *Brown*, the court accepted this argument, the applicants could rely upon section 5, which authorizes the court to grant an extension of time,

[n]otwithstanding any limitation of time for the bringing of an application for judicial review fixed by or under any Act, ... where it is satisfied that there are *prima facie* grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay.<sup>76</sup>

Again, it is open to argument as to whether section 286 imposes a time limitation upon "an application for judicial review". Secondly, if section 12, as modified by section 5, is not applicable,

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<sup>76</sup> The proposals of the Report of the English Law Commission, *op. cit.*, footnote 4, on time limitations are to be found at pp. 22-23. Although public inconvenience may be a reason for refusing relief under s. 2(5), it is unfortunate that s. 5 makes no reference to it.

then it remains open for the court, under section 2(5), to take account of any undue delay in the application for relief.

One final barrier stands in the way of the applicants' recovery of damages, even if they succeed in obtaining a declaration that the by-law and resolution are invalid. For the Municipal Act, section 344 provides that the by-law upon which the municipality relied must have been *quashed* or repealed. It is not clear whether a declaration of invalidity suffices for this purpose. In *Welbridge Holdings Ltd v. Metropolitan Corporation of Greater Winnipeg*,<sup>77</sup> Hunt J. held that the equivalent provision in the Manitoba legislation<sup>78</sup> precluded the recovery of damages even after the by-law had been declared invalid by the Supreme Court of Canada.<sup>79</sup> In the Manitoba Court of Appeal, Freedman J.A., in a dissenting opinion, stated that the earlier proceedings:<sup>80</sup>

...effectively declared that the by-law was dead, if indeed it was not still-born. To say it had not been quashed or repealed is simply to play with words and to ignore substance and reality.

This question was not reached by the majority of the Court of Appeal nor by the Supreme Court of Canada.<sup>81</sup> The answer must depend upon the purposes intended to be served by section 344. If the legislature intended to allow municipalities an opportunity to make amends and to protect them from financial liability in circumstances when a court in the exercise of discretion would not make an order rendering a by-law invalid,<sup>82</sup> then section 344 should be construed as if quashing included a declaratory judgment. If, on the other hand, the legislature also intended to impose a short time limitation period, by providing that the municipality be given early notice of the possibility of a claim for damages, as a result of the institution of section 283 proceedings within twelve months of the passing of the by-law, then the conclusion of Hunt J. is correct.<sup>83</sup> This would, however, not

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<sup>77</sup> (1969), 4 D.L.R. (3d) 509, at p. 519 (Man. Q.B.).

<sup>78</sup> Municipal Act, R.S.M., 1954, c. 173, s. 394.

<sup>79</sup> *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512.

<sup>80</sup> (1970), 12 D.L.R. (3d) 124, at pp. 137-138 (Man. C.A.).

<sup>81</sup> [1971] S.C.R. 957.

<sup>82</sup> This point is brought out by *Gray v. City of Oshawa*, *supra*, footnote 70, rev'd, [1972] 2 O.R. 856 (C.A.).

<sup>83</sup> Since the Public Authorities Protection Act, R.S.O., 1970, c. 374, s. 15 specifically exempts municipalities from the six months limitation period of section 11, and since the Municipal Act, *supra*, footnote 64, contains time limitation provisions in respect of particular wrongs, (see, for example, ss 340, 443(2)), it is submitted that interpretation implicit in the judgment of Hunt J. is questionable.

justify a refusal to award damages where, as in *Serre v. Township of Rayside-Balfour*,<sup>84</sup> declaratory summary relief was sought within the twelve months limitation period. These considerations give a, perhaps, unexpected point to the different reasons given by the Divisional Court in *Dorfman* for rejecting the applicants' request for declaratory relief and for setting aside.<sup>85</sup>

### Conclusions

(1) Neither the legislative history nor the plain language of the Judicial Review Procedure Act, 1971, supports the proposition that the Divisional Court has jurisdiction to set aside only decisions that are made in the exercise of a statutory power of decision.

(2) There are circumstances in which relief may be sought under the Judicial Review Procedure Act, 1971, as an alternative to a remedy created by some other statute.

(3) The references in the Judicial Review Procedure Act, 1971, to orders in the nature of mandamus, prohibition and certiorari should not be construed to include remedies, whether of common law or statutory origin, other than the orders that were substituted by the Rules of Practice for the prerogative writs; the words "in the nature of" do not compel an interpretation of the Act one way or the other.

There is arguably no inconsistency between *Re Brown* and *Re Ontario Provincial Police Association*, in that the 1971 Act was intended to remove the obscurities and deficiencies of the common law remedies, whereas similar problems did not surround analogous statutory remedies. Thus, to subject the applicant to the hazard of commencing proceedings in the wrong court, the common law motion to quash should be regarded, for the purpose of the Judicial Review Procedure Act, 1971, as being "in the nature of certiorari". However, the 1971 Act was

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<sup>84</sup> *Supra*, footnote 63.

<sup>85</sup> It should be noted that unless certiorari were available to quash a by-law or unless it was made in the exercise of a "statutory power of decision", the court could not set it aside, — which presumably would be considered a quashing for the purpose of s. 344, — even if the applicant were entitled to declaratory relief: Judicial Review Procedure Act, 1971, *supra*, footnote 5, s. 2(4). This point is obscured by *Re Maurice Rollins Construction Co. Ltd and Township of South Fredericksburgh*, *supra*, footnote 17. In *Re Clements and Toronto*, *supra*, footnote 72, at p. 22 (O.R.), Laidlaw J.A. stated that, "The jurisdiction of the Court to quash a municipal by-law upon application is not inherent, but is expressly conferred by legislation".

intended to simplify the procedure for obtaining judicial review of the exercise of public power; the source of consensual arbitrators' authority is, to a large extent, private in nature. Secondly, the remedial distinctions between the judicial review of statutory and consensual arbitration awards reinforce and reflect substantive differences in the scope of review of the respective remedies. Thirdly, if *Re Brown* is correct, then a distinction will have to be drawn between the statutory motion under the Arbitrations Act and the common law remedy, even though the issues raised might well be identical.

This, of course, brings into question the correctness of *Re Brown*,<sup>86</sup> so that, for example, the Municipal Act remedy of the application to quash a by-law, should be regarded as a proceeding "in the nature of certiorari". It is submitted that this should be rejected. First, the legislative history of the Judicial Review Procedure Act, 1971 clearly indicates that it was directed towards reform of the common law remedies. Secondly, the language of section 2(1), paragraph 1, falls far short of demanding the conclusion that the legislative purpose was any broader. Thirdly, to leave the statutory remedies outside the scheme of the 1971 Act would not create a unique anomaly; for example, questions of judicial review raised collaterally in a claim for damages alone, are not covered by the Act. Fourthly, the implications of construing the Judicial Review Procedure Act, 1971, an Act of general application, as entirely displacing remedies, specifically created by particular statutes, would have to be worked out piecemeal. In the absence of more compelling statutory language, there seems little to be said for adopting a construction of the Act that is likely to create unnecessary confusion where none previously existed.

J. M. EVANS\*

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<sup>86</sup> Unless *Re Union Felt Products (Ontario) Ltd and The Queen* (1975), 8 O.R. (2d) 438 (H.C.) is wrongly decided, it is difficult to argue that *Re Brown*, *supra*, footnote 55, is properly confined to the review of criminal proceedings.

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